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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOHN PATRICK HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and constitutional amendment involved	2
Statement	2
Summary of argument	8
Argument:	
Introduction	11
I. There was "probable cause" when the vehicle was stopped. Accordingly, the motion to suppress was properly denied	16
II. The evidence sustains the judgment of conviction	20
Conclusion	23

CITATIONS

Cases:

Bell v. *United States*, 274 F. 2d 82	20
Bringar v. *United States*, 338 U.S. 160	11, 12, 16, 17, 19, 20
Byars v. *United States*, 273 U.S. 29	16
Cannon v. *United States*, 158 F. 2d 952, certiorari denied, 330 U.S. 839	19
Carroll v. *United States*, 267 U.S. 132	11, 16, 17, 19
Carter v. *United States*, 231 F. 2d 232, certiorari denied, 351 U.S. 984	14
Davis v. *United States*, 328 U.S. 582	20
Draper v. *United States*, 358 U.S. 307	16
Dumbra v. *United States*, 268 U.S. 435	16
Fowler v. *United States*, 239 F. 2d 93	14
Gilliam v. *United States*, 189 F. 2d 321	14
Glasser v. *United States*, 315 U.S. 60	20
Green v. *United States*, 279 F. 2d 180, certiorari denied, 359 U.S. 917	14
Hall v. *United States*, 235 F. 2d 248	14
Harris v. *United States*, 331 U.S. 145	19, 20

Cases—Continued

	Page
Holland v. *United States*, 348 U.S. 121	20
Husty v. *United States*, 282 U.S. 694	11, 16, 18, 19
Jordan v. *United States*, 254 F. 2d 710	14
Lawson v. *United States*, 254 F. 2d 706	14, 18
Locke v. *United States*, 7 Cr. 339	14, 16
McCarthy v. *United States*, 264 F. 2d 473	13, 18
Morgan v. *United States*, 159 F. 2d 85	14
Nicholson v. *United States*, 6 F. 2d 569	19
Patenotte v. *United States*, 266 F. 2d 647	16, 19
Rios v. *United States*, No. 52, this Term	15
Silva v. *United States*, 101 F. 2d 889	16
Smith v. *United States*, 264 F. 2d 469	13, 18
Turner v. *Camp*, 123 F. 2d 846	18
United States v. *Allegaert*, 238 F. 2d 70	20
United States v. *Heitner*, 149 F. 2d 105, certiorari denied *sub nom. Cryan* v. *United States*, 326 U.S. 727	16
United States v. *Rabinowitz*, 339 U.S. 56	20
United States v. *Sherman*, 171 F. 2d 619	20
Wilson v. *United States*, 162 U.S. 613	20

Statutes:

18 U.S.C. 659	2
18 U.S.C. 3052	2

Miscellaneous:

American Law Institute, *Code of Criminal Procedure*, Section 18	14
Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201	14

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OPINION BELOW

The opinion of the Court of Appeals (R. 80-89) is reported at 259 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (R. 90) was entered on October 2, 1958. Petitioner's motion for a rehearing was denied on November 4, 1958 (R. 91). The petition for a writ of certiorari was filed on December 4, 1958, and granted on February 24, 1959, 359 U.S. 904; R. 91. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal officers, at the time they stopped the automobile in which petitioner was riding, had

probable cause to believe that the occupants had committed or were committing a felony cognizable under the laws of the United States.

2. Whether the evidence supported petitioner's conviction for the offense of unlawful possession of goods stolen from an interstate shipment.

STATUTES AND CONSTITUTIONAL AMENDMENT INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *

18 U.S.C. 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investi-

> gation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner and one Albert R. Pieratti were tried before the District Court for the Northern District of Illinois (a jury having been waived) on a charge of possessing three cartons of radios, valued at more than $100, which had been stolen from an interstate shipment. The court found both defendants guilty and sentenced them to imprisonment for a year and a day (R. 4-5, 72-75). The Court of Appeals affirmed (R. 80-91).

A. THE MOTION TO SUPPRESS

Prior to trial, petitioner filed a motion to suppress as evidence the three cartons of radios. This motion

did not allege that petitioner owned or possessed either the automobile in which the radios were found or the radios themselves (R. 7-9). After the hearing on the motion, however, an amendment was filed, alleging that on the day in question petitioner "was in possession of the within described goods and merchandise, as specified in the indictment, and that he had a proprietary interest in the said goods and merchandise" (R. 29). The motion to suppress was denied.

The only witness who testified at the hearing of this motion was George Stadtmiller, a special agent of the Federal Bureau of Investigation. We shall summarize, *first*, his testimony as to facts and circumstances known to him prior to the stopping of the automobile and, *second*, his testimony as to the events which directly followed.

(1) Agent Stadtmiller testified that, on May 13, 1957, he and another agent (Oitzinger) were investigating a theft from an interstate shipment of whiskey which had occurred the night before at 25th and Canal Streets in Chicago (R. 15, 21). At about 2:10 p.m., they saw petitioner and Pierotti walking across the street from the Red Top Tavern, located at 2903 South Wallace Street, Chicago (R. 18). Stadtmiller testified that he had previously conversed with these two men, but the nature of this conversation was not revealed, the court sustaining a defense objection to such an inquiry (R. 21). The United States Attorney then asked Stadtmiller (R. 21-22):

> Q. Had you ever received any information concerning the implication of the defendant Pierotti with interstate shipments?

Mr. PIEROTTI [attorney for defendant Pierotti]. Object.

The COURT. He may answer.

By Mr. WATTERS [United States Attorney]:

Q. Will you answer that please?

The COURT. Yes or no.

By the WITNESS:

A. Yes.

By Mr. WATTERS:

Q. From whom did you receive that information?

A. Mr. Lieberman, vice-president of Ziffrin Truck Lines.

Q. Is Mr. Lieberman the employer of defendant Pierotti?

A. Yes, sir.

The agents saw petitioner and Pierotti walk along the west side of the street and get into a 1953 black and white two-door Ford. With Pierotti at the wheel, they drove (south) to 30th Street, west to Lowe Street, north to 28th Street and then west to an alley between Union and Emerald Streets, with the two F.B.I. agents following. Just before reaching the entrance to the alley, the Ford paused momentarily, straddling the pedestrian crosswalk (R. 18). The Ford backed up and turned around, heading east, and then (in the next block) turned north into an alley running between Union and Lowe Streets (R. 19).

Stadtmiller got out of the Bureau car, walked to the alley entrance and observed the Ford about three-quarters of the way up the alley. Petitioner got out and entered a gangway. He was emptyhanded at

the time. He came out of the gangway about two minutes later carrying cartons, walked around in front of the car, got in and drove off (north) to 26th Street, on which he turned east (R. 19). After an unsuccessful attempt to catch up with the Ford, the agents returned to the Red Top Tavern and found the Ford parked across the street in the spot where they had first seen it.

After a time, petitioner and Picretti came out of the Tavern. They were not carrying anything. They stopped and talked for several minutes with a man named Steve Bodiqw and then returned to their Ford and drove off (R. 20). The agents followed them to the same alley, at which point the Ford was again driven in. Petitioner got out, went in the same gangway, and returned about two minutes later carrying more cartons. Stadtmiller was about 200 feet away while observing these movements. He did not know what was in the cartons (R. 25). The Ford then drove north to 26th Street, on which it turned east. The agents also drove east (their car being on 28th Street) and they intercepted the Ford when it headed south on Wallace Street. Stadtmiller motioned it to stop (R. 12, 20-21).

(2) Petitioner got out of the Ford, leaving the door open. Stadtmiller thought he heard him say, "Hold it; it is the G's." This was followed by, "Tell him he [you] just picked me up." (R. 22-23) Stadtmiller went up to the Ford, on the driver's side, and looked in. He saw some cardboard cartons bearing "Admiral" shipping labels which showed that the cartons were addressed to a company in Cincinnati. Two of

the cartons were sealed and the flap was open on the third (R. 13). The agents asked who owned the car and were told by Pierotti that he had borrowed it from somebody named "Babe". Asked about the cartons, he said that they were already in the car when it was borrowed. When the men were asked if they had just been at the Red Top Tavern, petitioner said he might have been there earlier that day, as he had been visiting numerous taverns. Pierotti said that he had just got off work at 2:30 (R. 24).

Stadtmiller took the car keys and opened the trunk, but found nothing of consequence (R. 13-14). After searching the Ford, the agents took the cartons and put them in the Bureau car. They asked petitioner and Pierotti to come to the office. All four got into the Bureau car and proceeded to the office, leaving the Ford parked on the street. This was about ten or fifteen minutes before three o'clock (R. 14-15). It was ascertained by inquiries made of various trucking firms that the cartons had been stolen from the Ziffrin Truck Lines. Shortly before 5:00 o'clock, petitioner and Pierotti were placed under arrest (R. 12, 17-18, 25).

B. EVIDENCE AT THE TRIAL

The three cartons of Admiral radios taken from the automobile used by petitioner and Pierotti were introduced in evidence. It was stipulated that these goods were stolen, that they had the statutory value and that they had been in interstate commerce at the time of the taking (R. 68-69, 33). John J. Oitzinger, the F.B.I. agent who assisted Stadtmiller, gave essentially the same account of the chain of events as

Stadtmiller had given at the hearing on the motion to suppress (R. 51-69). He also indicated that the alley premises from which the stolen goods were loaded into the car were residential premises (R. 61-62).

The owner of the Ford testified that he had loaned it to petitioner rather than to Pierotti, as the latter had stated (R. 241) on the morning of the day in question to enable petitioner to bet on a horse for him. There were no Admiral cartons in the car when it was loaned to petitioner (R. 36-39).

SUMMARY OF ARGUMENT

There is considerable authority in decisions of the courts of appeals for the proposition that less may be required for purposes of an officer's stopping an individual and making an inquiry (albeit this does involve a temporary restraint or detention) than is required for purposes of search, seizure, or arrest. Throughout these proceedings, however, this case has been argued by the Government's attorneys on the assumption that the United States was required to show "probable cause," in the traditional sense, as of the time that the officers halted the vehicle in which petitioner and his companion were riding. And the case was decided by the Court of Appeals on the basis that probable cause existed when the officers intercepted the automobile. We shall defend the judgment on the basis upon which it was rendered.

I

The concept of "probable cause" does not require the possession of evidence which would be sufficient

to convict. It is enough, as the term itself indicates, that a man of reasonable caution would be warranted in believing that the persons involved had committed an offense. In making an assessment of the circumstances, one must view them as they appeared to the officers at the time, and not by hindsight. The conduct of officers cannot be condemned, if they acted reasonably, because a violation other than the one anticipated was discovered. Contraband found during a lawful search is subject to seizure, even though it was not the original object of the search.

Viewed in totality, the circumstances known to the officers warranted their belief, as of the time that the vehicle was halted, that a federal crime had been committed. The following factors are to be taken into account: (1) a whiskey theft (from an interstate shipment) had been reported the previous day; (2) cruising in the neighborhood of the theft, the officers saw petitioner and his companion near a tavern; (3) both men were known to the officers, who had information that one of them, an employee of a trucking concern, had been "implicated" in connection with interstate shipments; (4) the men (with the officers following) proceeded by car, taking a somewhat indirect route and exhibiting some hesitation, to an alley; (5) there, they proceeded to pick up cartons (although the premises were not ordinary business premises) and load them into the car; (6) shortly thereafter, the car reappeared at its original spot near the tavern; (7) it was reoccupied by the two men after a brief interval and the same performance, *i.e.*, going to the alley and making a further pick-up, was repeated.

This course of conduct hardly appeared consistent with normal and honest behavior. Rather, it strongly indicated to the officers, who were trained observers, that the persons under surveillance were handling stolen goods (as, indeed, proved to be the fact). Moreover, it was reasonable for the officers to believe (though in this respect they proved mistaken) that the cartons loaded into the car in the course of the mysterious journeys were the cartons of whiskey which had recently been stolen in the neighborhood, and that the tavern was being used as an outlet. Plainly, it was out of question for the officers to secure a warrant for the search of the vehicle. It was evident that the cartons would soon be removed from the car, just as the previous load had been. In the circumstances, the officers were entitled to proceed without delay in executing their duties of law enforcement.

II

The evidence of guilt is clearly sufficient to sustain conviction. It was stipulated at the trial that the cartons of radios taken from the car were of the statutory value, that they had been shipped in interstate commerce, and that they had been stolen while in commerce. The only open issue, therefore, was whether the trier of the facts was justified in concluding that petitioner was a party to the theft.

The circumstances summarized above (Point I) fully support—indeed, they would seem to compel—that inference. Moreover, events which occurred after the vehicle was stopped provide further corroboration. Thus, there was evidence establishing that petitioner

borrowed the car used to carry the stolen property; that the car contained no contraband when the owner parted with it; and that the alibi proffered by petitioner to the officers was completely false.

ARGUMENT

INTRODUCTION

The Court of Appeals decided this case on the ground that, from the time the officers first stopped the car in which petitioner was riding, there was probable cause for believing that the two men in the vehicle were in the act of committing a felony, *to wit*, illegal possession of goods stolen from an interstate shipment. Thus, following a discussion of this Court's decisions on the subject of "probable cause"—specifically, *Carroll* v. *United States*, 267 U.S. 132, *Husty* v. *United States*, 282 U.S. 694, and *Brinegar* v. *United States*, 338 U.S. 160—the court below declared (R. 84-85): "* * * it is clear that here the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car." This is the holding below; it is not altered because the court went on to indicate (R. 85) that the grounds of the officers' belief were strengthened after they spoke to the two men and viewed the exposed cartons in the car.[1]

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[1] Petitioner argues (Br. 12-15) that the court below relied upon developments which took place subsequent to the stopping of the vehicle and that this was impermissible because the arrest took place at the moment of stoppage and could not be justified thereafter if it was not warranted *ab initio*. As indicated in the text, we think that this is a misreading of the opinion.

We defend the judgment (Point I, *infra*, pp. 16–20) on the basis upon which it was rendered, *i.e.*, that "probable cause," in the traditional sense, existed as of the time that the vehicle was stopped. If this Court agrees, it need go no further. If, however, this Court should assess the facts differently and disagree with the Court of Appeals on this issue of probable cause, there will remain an alternative theory upon which the Court might proceed to sustain the judgment. We do not urge this alternative theory upon the Court in this case—for reasons which we note below—but shall set it forth in summary before proceeding to our principal argument.

The alternative theory to which we refer is the theory which forms the basis of Mr. Justice Burton's concurring opinion in *Brinegar* v. *United States*, *supra*, a case which involved the stopping of an automobile and the search of its contents (revealing the possession of liquor being transported in violation of federal law). The concurring opinion states (338 U.S. at 179):

> It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the pres-

> ence of the agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences.

The view that something less may be required for purposes of an officer's stopping an individual and making an inquiry than is required for purposes of search, seizure, or arrest has been clearly stated in two very recent decisions of the Eighth Circuit, *Smith* v. *United States*, 264 F. 2d 469, and *McCarthy* v. *United States*, 264 F. 2d 473. Thus, in the *Smith* case, the court held (p. 472):

> Where the situation involved is one of such seeming probability, an Alcohol Tax Unit agent is warranted in stopping a car, with indication of his official status, for the purpose of inquiring of the occupants as to his identity or making observation of the vehicle. Probable cause may perhaps not at that time exist for searching the interior of the car, but if there is a warranting basis for stopping the vehicle, such information as the agent acquires in incidence, from proper acts of conversation or observation, is legally entitled to be taken into account in testing the probable cause which can be regarded as existing as to a subsequent search in which the agent may engage.[2]

[2] In the companion *McCarthy* case, the court declared (p. 475): "Whether, if the stopping had resulted in adding no further elements to the situation, the agents would have been justified in making a search of the car, we do not decide. As in the Smith case, elements were properly added by the stopping, which, in conjunction with what the agents had previously seen and knew, were entitled to be regarded as constituting adequate probable cause to warrant the search and seizure thereafter made." Note, also, the opinion of the

Although we think that a sound distinction may be drawn in proper cases between (1) a stopping and a limited detention for purposes of inquiry or investigation and (2) arrest in the usual criminal-law sense of "taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense", we do not deem it appropriate for the Government to press this point as a

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Sixth Circuit in *Gilliam v. United States*, 189 F. 2d 321, 323: "The question presented is not whether probable cause existed before the automobile was stopped and the officers talked with appellant. The question is whether the combination of what the officers saw with the reliable information they had received is probable cause to justify the search." For other cases adopting this approach, see *Turner v. Cox*, 125 F. 2d 849 (C.A. 5); *Hall v. United States*, 235 F. 2d 248 (C.A. 5); *Cohen v. United States*, 231 F. 2d 262 (C.A. 5), certiorari denied, 351 U.S. 984; *Lawson v. United States*, 264 F. 2d 706 (C.A. 8); *Jordan v. United States*, 254 F. 2d 710 (C.A. 8); *Morgan v. United States*, 159 F. 2d 85 (C.A. 10); *Fredricks v. United States*, 239 F. 2d 93 (C.A. 10); *Green v. United States*, 259 F. 2d 180 (C.A.D.C.), certiorari denied, 359 U.S. 917.

The quoted definition is that of the American Law Institute in its Code of Criminal Procedure (Section 18). See, also, Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, in which the author comments (pp. 258-259):

> "When officers arrive at a place where a serious crime has just been committed, they may require persons found there to remain at that place for a reasonable time for questioning. This is neither arrest, nor imprisonment. It is a technical 'confinement', but since it is very temporary and is a necessary incident to the proper exercise of a privilege, the word 'imprisonment' is not applied to it. The situation is comparable to the temporary detention of the driver of a truck while a duly authorized inspector tests the weight, or the momentary stopping of a motorist while an officer with proper authority calls for and examines his driver's license. The length of the detention for such questioning is considerably greater than that for

basis of decision in this case. (The Government, we note parenthetically, does propose to develop the point fully in the pending case of *Rios v. United States*, No. 52, this Term.) The reasons are as follows: In the Court of Appeals, the United States Attorney advised the court (R. 87) "that when the federal agents stopped the * * * car the arrest of the defendants occurred right then and there." The case was argued and decided in that court on the assumption that it was necessary to show "probable cause" as of the time that the automobile was stopped.[1] Moreover, in our brief in opposition to the petition for certiorari, we expressly advised this Court (p. 5) that we were adhering to the concession made by the United States Attorney and would argue the case on the same basis on which it was presented to the Court of Appeals. Accordingly, in the argument which follows, we shall again restrict ourselves in this case to the contention that probable cause was shown as of the time that the vehicle was stopped.

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these other purposes, but this is compensated for by the greater importance of the social interest involved."

The distinction suggested in the text does not imply that officers may halt and detain individuals on an arbitrary basis; it means only that less may afford basis for such a limited exercise of police authority than is required when officers go further, *i.e.*, when they conduct a search, make a seizure, or effectuate a full-scale arrest. What is a "reasonable" basis for limited detention and inquiry would have to be determined in the light of the particular circumstances, just as one determines, on the particulars of the case, whether cause for making an arrest was "probable".

[1] Note, in this connection, the dissenting opinion, R. 87.

I. THERE WAS "PROBABLE CAUSE" WHEN THE VEHICLE WAS STOPPED. ACCORDINGLY, THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

It is, of course, unnecessary to have evidence sufficient to convict in order to have probable cause for search, seizure, or arrest. *Carroll* v. *United States*, 267 U.S. 132, 161 162; *Brinegar* v. *United States*, 338 U.S. 160, 175 176; *Husty* v. *United States*, 282 U.S. 694, 700, 701; *Draper* v. *United States*, 358 U.S. 307, 310 312; *Dunbra* v. *United States*, 268 U.S. 435, 441. The inquiry is whether the circumstances known to the officers were such as to warrant a man of reasonable caution in believing that the parties in question were guilty of an offense. In this case, it is a question whether there was probable cause to believe that they were guilty of a federal offense. We think the circumstances here meet that test.

In judging the conduct of officers of the law, the situation must be viewed as it appears to the officers themselves at the time. They are in a position where prompt action may be essential to the achievement of effective law enforcement. They must go on appearances as they then exist, not on what subsequent developments may show. Just as the officers' conduct cannot be justified by what is turned up,[1] so

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See, also, *United States* v. *Heitner*, 149 F. 2d 105, 106 107 (C.A. 2), certiorari denied *sub nom. Cogan* v. *United States*, 326 U.S. 727; *Peoples* v. *United States*, 266 F. 2d 647, 650 (C.A. 5); *Soba* v. *United States*, 191 F. 2d 889, 890 (C.A. 7). For an early case defining probable cause as "circumstances which warrant suspicion," see Chief Justice Marshall's opinion in *Locke* v. *United States*, 7 Cr. 339, 348.

[1] *Byars* v. *United States*, 273 U.S. 28, 29.

also it cannot be condemned because a violation other than the one anticipated is discovered.

There had been a federal offense—theft of liquor from an interstate shipment—committed only the night before, at 24th and Canal Streets in south Chicago. In cruising the neighborhood, the officers saw two men known to them walking opposite the Red Top Tavern at 29th and Wallace Streets. One of these men was petitioner. The other was an employee of a trucking firm who, one of the officers had been informed, had been "implicat[ed] with interstate shipments." The record is not explicit as to the exact nature and extent of the implicating information which had been conveyed to the officer. But the record on this point is meager because the defense objected to the line of inquiry and because the trial judge, apparently out of an overzealous regard for the defendant's right to avoid self-incrimination (R. 21-22). In this posture, petitioner certainly is in no position to argue that the word "implicated" is not to be taken in its commonly understood sense, stated by Webster as follows:

> To bring into intimate or incriminating connection; to involve deeply or unfavorably; as, the evidence *implicates* many in this conspiracy; to be implicated in a crime.

Previous involvement with the law, particularly involvement in a similar offense, may be an important factor in determining whether there is probable cause. *Carroll* v. *United States*, 267 U.S. 132, 160; *Brinegar*

v. *United States*, 338 U.S. 160, 170; *Husty* v. *United States*, 282 U.S. 694, 700.[7]

A further factor, significant from the officers' standpoint, was that the two men were proceeding from a place of business (a tavern) which could be a possible outlet for stolen whiskey. The agents properly decided to follow them to see what they could learn. The events which they thereupon observed plainly called for explanation.

The two men followed an indirect route until they reached an alley. After hesitating at the entrance, they backed up, went a block to the east and entered another alley at that point (R. 19). When they picked up several cartons from a gangway in the alley, it was even more apparent that the situation called for explanation. The premises from which the cartons were obtained were not an ordinary place of sale, and the vehicle into which the goods were loaded was not a business vehicle. Although the unloading of the cartons was not witnessed, the Ford was seen parked in its original spot opposite the tavern shortly after the pick-up, and it was soon re-occupied by the two men, who then repeated the same performance of loading up cartons from the same premises. This was conduct giving ground for more than idle suspicion that petitioner and his companion were guilty of the federal offense the officers were investigating. The occurrences were in the neighborhood of the reported

[7] See, also, *Smith* v. *United States*, 264 F. 2d 169, 172 (C.A. 8); *McCarthy* v. *United States*, 261 F. 2d 473, 474 (C.A. 8); *Larson* v. *United States*, 254 F. 2d 706, 710 (C.A. 8); *Turner* v. *Crump*, 123 F. 2d 810, 812 (C.A. 5).

whiskey theft. The beginning and end of these mysterious journeys was a retail dealer in liquor. One does not ordinarily make deliveries of merchandise to a bar in a private passenger vehicle. And one does not ordinarily make repeated deliveries of merchandise in bulk to a retail liquor dealer unless one is carrying the kind of merchandise which the dealer is licensed to sell.

The officers were thus justified in believing that the time for action had arrived. One delivery had apparently been made, another seemed to be in process. Unless the officers were to ignore a chain of events which appeared inconsistent with any theory of normal and honest behavior and which seemed to point to the solution of the very theft they were investigating, the only practicable alternative was to act immediately and decisively. Procurement of a warrant authorizing search of the automobile was plainly out of question, for it was evident that the cartons might soon be removed, just as the previous load had been. In such circumstances, it suffices if there is reasonable cause to believe that a felony is being committed or that contraband is being transported. *Brinegar* v. *United States*, 338 U.S. 160, 176–177; *Husty* v. *United States*, 282 U.S. 694, 700–701; *Carroll* v. *United States*, 267 U.S. 132, 149; *United States* v. *Lee*, 274 U.S. 559, 563 (vessel); *Cannon* v. *United States*, 158 F. 2d 952, 954 (C.A. 5), certiorari denied, 330 U.S. 839; *Patenotte* v. *United States*, 266 F. 2d 647, 649 (C.A. 5); *Nicholson* v. *United States*, 6 F. 2d 569, 570 (C.A. 7). See, also, the dissenting opinions in *Harris* v. *United States*, 331 U.S. 145, 168; *United*

States v. *Rabinowitz*, 339 U.S. 56, 73; *Davis* v. *United States*, 328 U.S. 582, 609.

As stated at the outset, an arresting officer deals in probabilities, not certainties. *Brinegar* v. *United States*, 338 U.S. 160, 175; *Bell* v. *United States*, 254 F. 2d 82, 86 (C.A.D.C.). Here, the officers had good reason to halt the vehicle and to search (though search for the cartons actually proved unnecessary inasmuch as they were exposed to view). By the same token, they had good reason to seize the goods which, as they believed, were stolen property. As is well settled, contraband discovered during the course of a lawful search is subject to seizure, even though it was not the original object of the search. *Harris* v. *United States*, 331 U.S. 145.

II. THE EVIDENCE SUSTAINS THE JUDGMENT OF CONVICTION

The cartons of Admiral radios taken from the car in which petitioner was riding were introduced in evidence, and it was stipulated that they were of the statutory value, that they were being shipped in interstate commerce, and that they were stolen (R. 68–69, 33). The only issue on the evidence, therefore, is whether the trier of fact was justified in concluding that petitioner was a party to their theft.

Petitioner was observed to be in possession of the cartons of stolen radios. They were in a car in which he was a passenger. The car, moreover, was one over which he had dominion; he had borrowed it from the owner earlier in the day. Finally, he had been observed by the government agents loading the cartons

into the car from the gangway in the alley. The contention, after a finding of guilt, that it cannot be assumed that the cartons found in the car were the same cartons which had been picked up in the alley minutes before, is frivolous. There was no opportunity for an exchange to be made, and no hint in the evidence as to how such a change could have been accomplished. As held in *Wilson* v. *United States*, 162 U.S. 613, 619, "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."

It is sometimes stated erroneously that such possession supports a presumption of guilt, but such language is inaccurate, as that would impose upon an accused the burden of proving his innocence. *United States* v. *Allegrucci*, 258 F. 2d 70 (C.A. 3); *United States* v. *Sherman*, 171 F. 2d 619 (C.A. 2). However, unexplained possession does justify the trier of fact in drawing an inference. Here, no shred of evidence in any way tended to give an innocent explanation for the presence in the vehicle of the stolen goods except the statement by Pierotti, in petitioner's presence, that the cartons were in the car when it was borrowed. That was inconsistent with what the officers had seen and it was denied by the owner of the car (R. 36-39). There were other damaging circumstances. Petitioner had untruthfully denied that he had just come from the Red Top Tavern, and he had attempted to dissociate himself from the enterprise

by inventing an alibi (that he had just been picked up) which the officers knew to be false.

The trial judge was fully justified in concluding that all of these circumstances, taken together, amounted to proof beyond a reasonable doubt. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 140, in holding that a judge need not instruct the jury that circumstantial evidence must exclude every reasonable hypothesis other than guilt:

> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

The judgment must be sustained if, taking the view of the evidence most favorable to the government, there is substantial evidence to support it. *Glasser* v. *United States*, 315 U.S. 60, 80. That, we submit, is clearly this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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